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No. _____

In The

Supreme Court of the United States

OCEAN BULK SHIPS, INC. and
TRANSBULK CARRIERS, INC.,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Once a cargo claimant establishes a *prima facie* case for liability under the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-15, the burden shifts to the carrier to rebut this *prima facie* case. The carrier can do this by showing its entitlement to the benefit of one of the exemptions listed in COGSA § 4(2), 46 U.S.C. app. § 1304(2).

What is the nature of a carrier's rebuttal burden of proof under COGSA § 4(2)(a)-(p), 46 U.S.C. app. § 1304(2)(a)-(p), and does it differ from the rebuttal burden of proof under COGSA § 4(2)(q), 46 U.S.C. app. § 1304(2)(q)?

LIST OF PARTIES PURSUANT TO RULE 29.6

All parties to the proceeding in the United States Court of Appeals for the Fifth Circuit appear in the caption of the case.

Petitioners, Ocean Bulk Ships, Inc. and Transbulk Carriers, Inc., are not publicly-traded corporations. Their parent company is OSG Bulk Ships, Inc., a New York corporation, which is wholly owned by Overseas Shipholding Group, Inc., a Delaware corporation whose shares are publicly-traded.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, set forth in Appendix A ("App. A"), is reported at 248 F.3d 331 (CA5 2001). The order of the court of appeals denying petitioners' motion for rehearing *en banc* is not reported. It is set forth in Appendix D ("App. D"). The decision and judgment of the United States District Court for the Southern District of Texas are also unreported. They are set forth in Appendix B ("App. B") and Appendix C ("App. C"), respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 10, 2001. *See* App. A at A-2. Petitioners' timely Motion for Rehearing *En Banc*, filed on May 24, 2001, was denied on June 8, 2001. *See* App. D. This petition was filed within ninety days following the denial of the motion for rehearing, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was based on the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315, the general maritime law of the United States, and 28 U.S.C. § 1333(1).

STATUTE INVOLVED IN THIS CASE

Section 4(2) of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. § 1304(2), provides:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from –

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representative;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Saving or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

STATEMENT OF THE CASE

I. Background Facts

Between April 1994 and January 1996, various private relief agencies arranged for the M/V Overseas Harriette and the M/V Overseas Marilyn to carry famine relief foodstuffs to various west African ports from ports in Texas, Louisiana, and Florida. Both vessels were owned and operated by petitioners and chartered to the U.S. Agency for International Development ("USAID"), an independent federal government agency. All cargoes were loaded aboard the vessels in good condition, but portions of the cargoes were either damaged, missing, or

pilfered at the discharge ports resulting in alleged aggregate damages of $203,319.87. The parties' agreements and bills of lading incorporated the terms and provisions of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-1315.

II. Proceedings

A. The Trial

During December 1998, the United States, as assignee of the relief agencies' cargo claims, filed four lawsuits against petitioners in the United States District Court for the Southern District of Texas seeking recovery under COGSA for the alleged damage and non-delivery of the cargo. The four lawsuits were consolidated and the petitioners answered the consolidated complaint asserting, among other defenses, the exemptions to liability codified at COGSA § 4(2)(n) & (q), 46 U.S.C. app. § 1304(2)(n) & (q).

A bench trial was held on September 28, 1999. Subject to petitioners' objections, the government put in evidence as to the condition and quantity of the cargoes at the load and discharge ports, causation, and the alleged values of the damaged, missing, and pilfered cargoes. In its Findings of Fact and Conclusions of Law, issued on December 17, 1999 (App. B), the district court found that "the contents of surveys are insufficient to establish carrier's liability for the non-delivered and damaged cargo." The court did award $7,300.08 for wetting damage that petitioners admitted occurred prior to discharge.

B. The Appeals

The government appealed, and petitioners cross-appealed, to the United States Court of Appeals for the Fifth Circuit. The government argued that it had produced sufficient evidence to prove a *prima facie* case of liability against petitioners under COGSA. Petitioners responded that the district court properly viewed the evidence produced by the government as unreliable and, as a result, the district court correctly held that petitioners were not liable beyond the admitted liability ($7,300.08) for wetting damage.

The court of appeals vacated the judgment of the district court and rendered judgment in favor of the government for $203,319.87. The court of appeals held that the government had introduced sufficient evidence to carry its initial burden of proof. It also held that petitioners failed to rebut the government's *prima facie* case and, as a result, they could not avoid liability under the two COGSA exemptions to liability they had asserted. In so holding, the panel concluded that it was compelled to follow *Waterman S.S. Corp. v. United States Smelting, Refining & Mining Co.*, 155 F.2d 687 (CA5 1946), *cert. denied*, 329 U.S. 761 (1946), the earliest Fifth Circuit decision on the issue. The court also noted that an inter-circuit conflict exists as to whether the carrier's rebuttal burden of proof under COGSA § 4(2)(a)-(p) is one of production or of persuasion.

The court of appeals denied petitioners' Motion for Rehearing *En Banc*. *See* App. D.

REASONS FOR GRANTING THE PETITION

This Court should clarify the nature of the rebuttal burden of proof in a case governed by the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-15, once a shipper makes out a *prima facie* case of liability. The six courts of appeals that have addressed the issue are divided on this question, and this Court has never addressed it. Additionally, COGSA is a statute for which uniformity of interpretation was a primary purpose for enactment, and its uniform interpretation is especially important in view of the significant amount of domestic and international commerce governed by it. The need for clarification and uniform application is illustrated in this case, where a carrier was deprived of a COGSA defense due to an erroneous interpretation and application of a statutory exemption to liability.

This Court should grant certiorari because of the conflict among the Circuits and because of the importance of the issue. Sup. Ct. R. 10(a) & (c). As this Court has held, "a principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

I. The courts of appeals apply conflicting standards to the carrier's rebuttal burden of proof under COGSA § 4(2).

The courts of appeals generally agree that COGSA sets up an intricate burden-shifting scheme between the

cargo claimant and the carrier.[1] The burden is initially on the claimant to establish a *prima facie* case. Once the claimant has established a *prima facie* case, the burden shifts to the carrier to rebut it. The carrier can do this by showing its entitlement to the benefit of one of the exemptions listed in COGSA § 4(2). However, there is no uniform agreement regarding the nature of the carrier's burden of proof necessary under § 4(2)(a)-(p).

As noted below, § 4(2)(q) specifically requires a carrier claiming under that subsection to show its freedom from fault, which has been variously described by the circuits as a more demanding burden of proof. The Fifth Circuit, in the decision below, has held that the same demanding burden of proof applies under § 4(2)(a)-(p). The First, Second, Third, and Ninth Circuits, in conflict with the decision below, impose a lower burden on the carrier under § 4(2)(a)-(p) than under § 4(2)(q). Only the Eleventh Circuit appears to follow the Fifth Circuit on this question.

The issue has been a source of confusion for the lower courts (and for the commercial parties that must apply their decisions) for a number of reasons. One problem has been the terminology that the courts have used when discussing the issue. The key point in all of these

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[1] *See, e.g., EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715, 719 (CA1 1984); *In re Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 229 (CA2 1982); *Sun Oil Co. v. M/T Carisle*, 771 F.2d 805, 810-11 (CA3 1985); *United States v. Ocean Bulk Ships, Inc.*, App. A at A-5-7, 248 F.3d 331, 335-36 (CA5 2001); *Taisho Marine & Fire Ins. v. M/V Sea-Land Endurance*, 815 F.2d 1270, 1274-75 (CA9 1987); *Banana Services, Inc. v. M/V Fleetwood*, 911 F.2d 519, 521 (CA11 1990).

cases has been whether the carrier must prove its own freedom from fault in order to rely on the exemption in question. Some courts have discussed the issue in these terms, but some (including the court below) have used a confusing shorthand. These latter courts have spoken of a "burden of persuasion" when they mean that the carrier must prove *both* the applicability of the § 4(2) exemption *and* its own freedom from fault. They have spoken of a "burden of production" when they mean that the carrier must prove *only* the applicability of the § 4(2) exemption (without proving its own freedom from fault).

A. The First Circuit.

The First Circuit describes the carrier's rebuttal burden of proof under § 4(2)(q) as a "burden of persuasion . . . to show that it was not at fault in contributing to the loss or damage." *EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715, 720 (CA1 1984). In contrast to subsection (q), which imposes "the most demanding burden under maritime law," *id.*, the carrier's rebuttal burden under the other § 4(2) exemptions is "less imposing." *Id.* at 720 n.9.

The *EAC Timberlane* court further observed that subsection (q) requires an initial affirmative showing by the defendant-carrier that it is free from fault, unlike the usual case under the general maritime law in which the plaintiff initially bears the burden of proving the defendant's negligence. It is only then that the "burden of persuasion shift[s] to the defendant to rebut the plaintiff's evidence." *Id.* at 720.

B. The Second and Third Circuits.

The Second and Third Circuits describe the carrier's rebuttal burden of proof under § 4(2)(q) as requiring proof of freedom from fault or negligence, a burden not required under the other § 4(2) exemptions.[2] *See, e.g., In re Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 229 (CA2 1982)[3] (distinguishing the burden of proof required under § 4(2)(q), the court stated that "[w]hen Congress wanted to put the burden of proving freedom from fault on a shipowner claiming the benefit of an exemption, it specifically said so");[4] *Sun Oil Co. v. M/T Carisle*, 771 F.2d 805,

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[2] In *Nichimen Co. v. M.V. Farland*, 462 F.2d 319 (CA2 1972), the court said that "§ 4(2)(q) imposes on the carrier 'no mere burden of going forward with the evidence, but a real burden of persuasion, with the attendant risk of non-persuasion.' " *Id.* at 329 n.9 (quoting Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 3-37, at 146 (1st ed. 1957)).

[3] The *Ta Chi Navigation* court criticized the Ninth Circuit's decision in *Sunkist Growers, Inc. v. Adelaide Shipping Lines*, 603 F.2d 1327 (CA9 1979), *cert. denied*, 444 U.S. 1012 (1980), as enhancing the carrier's rebuttal burden under the fire exemption (§ 4(2)(b)) by requiring the carrier to prove freedom from fault, thereby reading the language of subsection (q) into subsection (b), "although Congress did not put it there," 677 F.2d at 229 (*quoting Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426, 432 (CA2 1962)).

[4] *Accord Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d at 432 ("To hold that when a carrier has shown that the loss arose as a consequence of restraint of princes, § 4(2)(g), it still has the burden of negating any other fault or neglect of its agents or servants would be to read the qualification of (q) into (a)-(p), although Congress did not put it there."); *Hecht, Levis & Kahn, Inc. v. S.S. President Buchanan*, 236 F.2d 627, 631 (CA2 1956) ("The language relating to burden of proof in [§ 4(2)(q)]

811 (CA3 1985) ("Thus, if the carrier wants to escape liability under COGSA without reference to a cause specified in [§ 4(2)(a)-(p)], it must prove that its negligence did not contribute to the loss.").

C. The Fifth Circuit.

The decision below sets forth the Fifth Circuit position that the carrier must satisfy the higher burden, described as "a burden of persuasion," as to all seventeen exemptions. *See* App. A at A-12-13 & n.2, 248 F.3d at 339-40 & n.2 (*citing Waterman S.S. Corp. v. United States Smelting, Refining & Mining Co.*, 155 F.2d 687 (CA5 1946)).

D. The Ninth Circuit.[5]

As in the Second and Third Circuits, the Ninth Circuit has generally described the carrier's rebuttal burden of proof under § 4(2)(q) as requiring proof of freedom from fault, which is not required under the other § 4(2) exemptions. *See, e.g., American Home Assurance Co. v.*

. . . pretty clearly refers only to the carrier's burden of proving that damage comes within subsection (q) and does not relate to the 'inherent vice' exception contained in [§ 4(2)(m)].").

[5] The opinion below cites *Tokio Marine & Fire Ins. v. Vessel Sammi Aurora*, 903 F.2d 1244 (CA9 1990), as an example of a circuit decision that supports imposing a burden of persuasion under all COGSA exceptions. *See* App. A at A-13-14, 248 F.3d at 339. However, without differentiating among the COGSA exemptions to carrier liability, the court in *Tokio Marine* referred to the "catch-all" exemption when it noted that a carrier is not liable for damages arising without its actual fault, which it had the burden of proving. *Tokio Marine*, 903 F.2d at 1246.

American President Lines, 44 F.3d 774, 781 (CA9 1994) (discussing the added burden under subsection (q) to show freedom from fault); *In re Damodar Bulk Carriers, Ltd.*, 903 F.2d 675, 686 (CA9 1990) (discussing the legislative history and contrasting rebuttal burdens of proof required under the fire exemption and subsection (q)).

In re Damodar Bulk Carriers, 903 F.2d at 683 & n.11, also addressed the tension between the Ninth Circuit and the Second Circuit over the Ninth Circuit's decision in *Sunkist Growers, supra*, regarding the carrier's burden of proof under the COGSA fire exemption, § 4(2)(b). See note 3, *supra*. The court distinguished *Sunkist Growers* as involving a fire loss arising from the ship's unseaworthiness, which barred the carrier from invoking the fire exemption. The court explained that where unseaworthiness was not proven, the carrier had no heightened burden of proof. In that same discussion, the court acknowledged the split that had developed among the circuits over the burden of proof required under the COGSA fire exemption due to its interrelationship with the Fire Statute, 46 U.S.C. app. § 182.

E. The Eleventh Circuit.

The decision below cites *Sony Magnetic Products, Inc. v. Merivienti O/Y*, 863 F.2d 1537 (CA11 1989), to suggest that the Eleventh Circuit either imposes the higher burden on the carrier under all the § 4(2) exemptions, or that it has not differentiated the rebuttal burden among them. App. A at A-13-14, 248 F.3d at 339-40. In *Sony Magnetic Products*, the court did not discuss the precise nature of the carrier's rebuttal burden but held the carrier liable

because it did not produce any credible evidence establishing a latent defect defense under § 4(2)(p). 863 F.2d at 1540-41. The court affirmed the district court's rejection of the carrier's latent defect defense describing its evidence as "inconclusive," while the shipper's evidence offered "the more credible explanation." *Id.* at 1540.

Although the Eleventh Circuit did not discuss the nature of the burden of proof necessary to rebut the shipper's *prima facie* case, in describing the COGSA burden-shifting scheme it noted that the carrier's negligence was considered **after** the carrier successfully rebutted the shipper's *prima facie* case. Only then did the shipper have the burden of showing that the carrier's negligence was a concurrent cause of the loss. *Id.* at 1539.

Other Eleventh Circuit cases similarly do not clearly differentiate between the rebuttal burdens of proof required under the various COGSA exemptions. *See, e.g., Banana Services, Inc. v. M/V Fleetwood*, 911 F.2d 519, 522 (CA11 1990) (carrier's proof of due care "coupled with conclusive evidence regarding the delicate nature of this particular cargo" was sufficient to establish a circumstantial case of inherent defect and was the only explanation for the loss); *Associated Metals & Minerals v. Etelae Suomin Laiva*, 858 F.2d 674, 678 (CA11 1988) (carrier had burden of proving that peril of sea "was unavoidable despite all reasonable efforts to avoid it"); *Philip Morris v. American Shipping Co.*, 748 F.2d 563, 566 (CA11 1984) (once a *prima facie* case is made, carrier must prove that the damage falls within one of the COGSA exemptions or that it exercised due diligence); *Terman Foods, Inc. v. Omega Lines*, 707 F.2d 1225, 1227-28 (CA11 1983) (carrier that offered no exculpatory evidence and merely alleged that

it had used due diligence to make ship seaworthy was liable under § 4(2)(q), which "imposes the burden of persuasion on a defendant to show that it was not at fault in contributing to the loss or damage").

F. Summary.

The foregoing survey of circuit decisions reflects the lack of uniformity among the circuits as to the nature of the rebuttal burden of proof required under COGSA § 4(2)(a)-(p) to successfully rebut a shipper's *prima facie* case. Only the "catch-all" exemption in § 4(2)(q) specifically sets forth the evidentiary burden imposed upon the carrier asserting that defense. Accordingly, the circuits have consistently and uniformly held that a carrier claiming under that exemption must bear a burden of persuading the trier of fact that it is free from fault in causing the loss. None of the other statutory exemptions place such a burden on the carrier. However, in this case, the Fifth Circuit clearly held petitioner to an unjustifiably higher rebuttal standard, at least as to its defense under the improper packaging exemption, § 4(2)(n).

Petitioner produced sufficient evidence at trial to rebut a *prima facie* case under subsection (n), which accounted for approximately 40% of the damages awarded to the government. However, by imposing an enhanced rebuttal burden under that subsection, the appellate court rendered judgment without affording the petitioner the benefit of that exemption as Congress intended. Indeed, the district court never considered the necessity or the sufficiency of petitioner's rebuttal evidence under § 4(2)(n).

COGSA was enacted in 1936, and since that time, the nature of the carrier's rebuttal burden of proof has never been addressed by this Court (as discussed below). If this Court does not clarify the nature of the carrier's rebuttal burden of proof under the COGSA § 4(2) exemptions, the lower courts will continue to impose upon carriers disparate standards and, in the Fifth Circuit at least, greater rebuttal burdens of proof than the statute imposes.

II. This Court has never addressed the issue.

The decision below relies upon this Court's opinion in *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (1941), as providing the framework for its interpretation of the carrier's rebuttal burden of proof under COGSA. *See* App. A at A-12-13, 248 F.3d at 339. However, *Commercial Molasses* did not involve COGSA.[6] Instead, the parties in that case had entered into a contract of affreightment for private carriage. For that reason, the Court was "not concerned with the rule that one who has assumed the obligation of a common carrier can relieve himself of liability for failing to carry safely ***only by showing that the cause of loss was within one of the narrowly restricted exceptions which the law itself annexes to his undertaking*** . . . ." 314 U.S. at 109

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[6] Discussing the burden of proof for cargo loss in the context of private carriage, the Second Circuit stated that the "rule for private carriage of goods is explicated in [*Commercial Molasses*], which applies here unless a statute or an agreement between the parties changed the normal burden." *In Re Marine Sulphur Queen*, 460 F.2d 89, 103 (CA2 1972), *cert. denied*, 409 U.S. 982 (1972).

(emphasis added). In those cases, the Court explained that to avoid liability, the carrier had the burden of showing "that the loss was due to an excepted cause and that he has exercised due care to avoid it . . . ." *Id.*

Notwithstanding the fact that *Commercial Molasses* did not involve (or even mention) COGSA, the Fifth Circuit concluded that "[t]he proposition that a carrier bears both the burden of production and the burden of persuasion with respect to the [COGSA] exceptions was drawn from [the *Commercial Molasses* decision]." App. A at A-12, 248 F.3d at 339. This conclusion was premised on the Court's comment in *Commercial Molasses* regarding a common carrier's burden of showing that a loss was due to "a permitted exception to the obligation to carry safely" rather than a breach of the duty to furnish a seaworthy vessel, "since the burden is on the shipowner, he does not sustain it, and the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception." *Id.* (*citing Commercial Molasses*, 314 U.S. at 109).

This Court's comments in *Commercial Molasses* regarding the burden of proof required of a common carrier were made to contrast the burden of proof at issue in that case, where the private shipper (and not a common carrier) bore the burden of proof because "the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks . . . ." 314 U.S. at 110.

As *Commercial Molasses* did not involve COGSA, the Court's comments pertaining to a common carrier's burden of proving seaworthiness were simply illustrative

dicta. These comments do not offer authoritative insight into congressional intent as to the nature of the burden of proof a carrier must satisfy in order to avail itself of the COGSA exemptions to liability.

III. Uniformity is particularly important in this context because the need for a uniform law governing the carriage of goods by sea was the primary justification for COGSA's enactment.

In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297 (1958), this Court implicitly recognized the value of uniformity when deciding questions under COGSA. The *Herd* Court noted that COGSA was "lifted almost bodily from the Hague Rules," 359 U.S. at 301, which were designed to promote uniformity, *see id.*, and it based its conclusion in large part on foreign decisions addressing the same issues, *see id.* at 306-308. In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995), the Court was more explicit:

> In light of the fact that COGSA is the culmination of a multilateral effort "to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade," . . . we decline to interpret our version of the Hague Rules in a manner contrary to every other nation to have addressed this issue. . . . [C]onflicts in the interpretation of the Hague Rules not only destroy esthetic symmetry in the international legal order but impose real costs on the commercial system the Rules govern[.]

515 U.S. at 537 (quoting *Herd*, 359 U.S. at 301).

This judicial recognition of the value of uniformity in the interpretation of COGSA is fully justified. When Congress enacted COGSA, its principal goal was to promote uniformity in the law governing the carriage of goods by sea. *See, e.g.*, 79 CONG. REC. 13341 (1935) (statement of Sen. White, the bill's sponsor) ("[t]he bill is designed to bring about uniformity"); S. REP. NO. 742, 74th Cong., 1st Sess. 4 (1935) (the bill "will accomplish real uniformity"); H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6 (1936) ("[t]he most outstanding benefits are simplification and uniformity"). In fact, COGSA has been described as "a rare example of a federal statute that Congress passed with more concern for its uniformity than for its content." Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEXAS L. REV. 1251, 1271 (1989).

Commentators have explained in some detail why conflicts in the interpretation of COGSA are particularly harmful:

> Cargo losses and damage at some level are an inevitable result of transporting goods by sea. The law must allocate financial responsibility for these losses, and in the process it influences the actions of those who participate in the enterprise. A carrier must decide the level of care that is appropriate for each shipment, and this decision will be based in part on its potential liability. A shipper must also decide the appropriate level of care on such matters as the cargo's preparation for shipment, and the extent to which it will insure the goods. Each of these decisions will be based in part on the extent to which it may recover from someone else (such as the carrier) for any losses. Insurers must

> decide what coverages they will offer and the terms on which coverage will be available. Potential buyers of the cargo must determine what protections they require. Bankers financing a transaction must know whether they can depend on a security interest in the goods in transit. And all of these decisions will be based in part on the liability regime that allocates the risk of loss.
>
> If the law is uniform, everyone involved in a transaction will know that its liability (or recovery) will be the same wherever a dispute is resolved. Results will be more predictable, litigation will be less necessary, and the parties will be able to make their underlying business decisions in confidence, knowing what law will be applied if loss or damage occurs.
>
> A lack of uniformity imposes real costs on the commercial shipping system that the Hague Rules govern.

Michael F. Sturley, *Uniformity in the Law Governing the Carriage of Goods by Sea*, 26 J. MAR. L. & COM. 553, 558-59 (1995) (footnotes omitted).

Unless this Court steps in to resolve the conflict here, carriers will not know what burdens will be imposed on them until they learn where they have been sued – or bring a preemptive action for a declaration of nonliability. Similarly, cargo owners will be unable to predict the extent of their recoveries until they can obtain jurisdiction over a carrier in a particular circuit. Insurers will have greater difficulty calculating premiums, and bankers will have less confidence in the value of their security.

Much of the judicial, legislative, and academic focus has admittedly been on international uniformity, but the rationale is just as strong in the domestic context. Just as international traders need to know the governing law in the countries in which they do business, so international and domestic businesses need to know the law of the entire United States. Indeed, domestic uniformity is a precondition for achieving international uniformity. If the courts of appeals cannot agree among themselves how to interpret COGSA, how can the United States be part of a uniform international consensus on the interpretation of the Hague Rules? This Court's intervention is required.

IV. Resolving this conflict is important in both international and domestic trade.

While maintaining a uniform interpretation of COGSA is always important, in view of Congress's expressed goal of achieving uniformity in this field, the need for uniformity on this question is particularly great. Virtually every COGSA case involves the allocation of burdens of proof. Even when burden of proof issues are not raised explicitly in the litigation, the parties' ability to settle the case will be based on their predictions about how the court will resolve burden of proof issues. As the Fourth Circuit has noted, COGSA "imposes critical proof problems for any shipper," and COGSA's "proof scheme" is "of supreme importance in its application to particular disputes." *In re Intercontinental Properties Management*, 604 F.2d 254, 262 (CA4 1979).

The importance of COGSA itself is also well-recognized. One commentator has described it as "the most

important and most frequently litigated statute in American international trade." Joseph C. Sweeney, *The Prism of COGSA*, 30 J. MAR. L. & COM. 543, 545 (1999). The numbers bear out this description. Government statistics suggest that well over half a trillion dollars worth of cargo is carried to or from the United States each year under the liability regime established by COGSA.[7] Knowing how that statute allocates liability is thus a matter of

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[7] In 2000, approximately $485 billion worth of cargo was carried to or from the United States on "liner" terms, which would mean that bills of lading were issued to evidence the contract of carriage. *See* U.S. Maritime Administration, U.S. Foreign Waterborne Transportation Statistics. See the MARAD website located at <http://www.marad.dot.gov/statistics/usfwts/PR2000/prdec2000.htm> ("Foreign Waterborne Transportation Statistics"). Virtually all of this would have been subject to COGSA as a matter of law. *See, e.g.*, 2A *Benedict on Admiralty* § 41 (7th rev. ed. 2001) (COGSA applies as a matter of law to shipments in foreign trade carried under bills of lading) ("*Benedict*"). In addition, over $126 billion worth of cargo was carried to or from the country on tankers (which inevitably operate under charter parties), and almost as much on "tramps" (which by definition operate under charter parties). *See* Foreign Waterborne Transportation Statistics, *supra*. A very high proportion of this would be subject to COGSA as a matter of contract, *see, e.g.*, 2A *Benedict* § 43 (discussing the contractual application of COGSA to carriage under charter parties), just as the cargo in this case was, *see* App. A at A-4-5, 248 F.3d at 335. Moreover, most domestic cargo in the coastal trade and a high proportion of the cargo carried on inland waterways is subject to COGSA as a matter of contract. *See, e.g.*, 2A *Benedict* § 42 (discussing the application of COGSA to domestic carriage). The half a trillion dollar figure in the text is accordingly a very conservative estimate. The true figure is probably more than 50% higher.

vital importance to all of those who are involved in international trade.

CONCLUSION

The Petition for Writ of Certiorari should be granted so that this Court can resolve the acknowledged conflict involving six federal circuits.

Respectfully submitted,

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September 6, 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
Fifth Circuit.

No. 00-20117

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

VERSUS

OCEAN BULK SHIPS, INC.; TRANSBULK CARRIERS,
Defendants-Appellees-Cross-Appellants,

M/V OVERSEAS HARRIETTE, its engines, tackle, etc.,—
in rem; M/V OVERSEAS MARILYN,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

VERSUS

OCEAN BULK SHIPS, INC., in personam,
Defendant-Appellee-Cross-Appellant,

M/V OVERSEAS HARRIETTE, its engines,
tackle, etc., in rem,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

VERSUS

OCEAN BULK SHIPS, INC., in personam,

Defendant-Appellee-Cross-Appellant,

M/V OVERSEAS MARILYN, its engines, tackle, etc., in rem,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee,

VERSUS

OCEAN BULK SHIPS, INC., in personam,
Defendant-Appellee-Cross-Appellant.

Appeals from the United States District Court
For the Southern District of Texas

(Filed Apr. 10, 2001)

Before KENNEDY,[1] JONES and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

This appeal involves loss and damage to five separate famine relief shipments made by the United States of America (the United States) to certain African ports. Plaintiff-shipper, the United States appeals a final judgment awarding only limited damages in the amount of $7,300.08 on its claims for cargo loss and damage in the amount of $203,319.87 under the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. §§ 1300-1315. The United States asks this Court to vacate the district court's limited judgment and to render judgment in favor of the United States for the full extent of its damages. Defendants-carriers (defendants) cross-appeal, arguing that the

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[1] Circuit Judge of the Sixth Circuit, sitting by designation.

United States failed to establish a prima facie case of loss or damage and that the United States failed to submit competent proof to support the damages claimed. Having reviewed the record, the arguments of the parties, and the relevant law, we vacate the district court's judgment awarding $7,300.08 and render judgment in favor of the United States in the amount of $203,319.87 plus prejudgment interest.

I.

Between 1994 and 1996, the United States, through its Commodity Credit Corporation (CCC), and with the assistance of several private relief organizations, shipped cargoes to famine-stricken areas of Africa on behalf of the Agency for International Development (AID). The cargoes were shipped under various charter parties made expressly subject to COGSA on the M/V OVERSEAS HARRIETTE and the M/V OVERSEAS MARILYN, vessels owned by the defendants, Ocean Bulk Ships, Inc., and Transbulk Carriers, Inc. The shipments included a variety of foodstuffs such as vegetable oil, corn, and bulgur wheat, which were shipped to the African ports of Mombasa, Kenya; Beira and Maputo, Mozambique; Freetown, Sierra Leone; and Tema, Ghana. Clean bills of lading were issued for each shipment after the cargo was stowed, indicating that the cargo was received by the carrier in good condition. Unfortunately, the goods were not received in the same quantity or quality when discharged in Africa. Survey reports documenting the loss and damage indicated several problems. Some parts of the cargo were simply not received at all. Some parts of the cargo were received in a damaged and unusable condition. For

example, bags were torn and spilled, and some of the cargo was wetted and rotten. The total amount of documented loss and damage to the cargo was $203,319.87.

In December 1998, the United States filed the first of five lawsuits, seeking damages for the lost and damaged cargo under COGSA. In February 1999, these suits were consolidated. In September 1999, the matter was tried to the bench. In December 1999, the district court entered judgment in favor of the United States for the limited sum of $7,300.08, the amount of damage that the defendants admit occurred prior to discharge. This appeal ensued.

II.

When COGSA was enacted in 1936, one of its express purposes was to "redress the edge in bargaining power enjoyed by carriers over shipper and cargo interests by setting out certain duties and responsibilities of carriers that cannot be avoided even by express contractual provision." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 10-15 (3d ed.2001) (citing 46 U.S.C. App. § 1303(8)). COGSA applies to "all contracts for carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. App. § 1312. The provisions of COGSA are not generally applicable to charter parties. *Id.* § 1305. A shipper and carrier may agree, however, to a "Clause Paramount" by which the terms of COGSA are incorporated into a charter party. Schoenbaum, *supra*, § 10-15, at 89 & n.6. In this case, the charter agreements, shipping contracts, and bills of lading contain clauses making the

shipments subject to the terms of COGSA. Thus, the parties agree that COGSA governs the resolution of this dispute.

COGSA sets up a "complex system of shifting burdens and accompanying presumptions of liability." *Id.* § 10-23, at 115. This use of presumptions and shifting burdens of proof "predates the statutory schemes of liability" and is "thus rooted in strong policy considerations" specific to the context of cargo loss. Most of these rules developed to alleviate the perceived unfairness of certain common law rules requiring a shipper to conclusively prove the cause of cargo loss or damage notwithstanding the fact that the circumstances surrounding the loss or damage were primarily accessible to the defendant-carrier. *Id.* Those policy considerations are evident in COGSA's current statutory scheme, which shifts the burden of proof "more frequently than the winds on a stormy sea." *Id.*; *see also Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995) (characterizing COGSA's statutory scheme as a "ping-pong" game of burden shifting). The first stage of COGSA's statutory framework requires the shipper to establish a prima facie case of loss or damage by "proving that the cargo for which the bill of lading was issued was loaded in an undamaged condition, and discharged in a damaged condition." *Tubacex*, 45 F.3d at 954; *see also Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238, 240 (5th Cir. 1984). A clean bill of lading issued by the carrier to the shipper is prima facie evidence that the goods were received in an undamaged condition. *Shell Oil Co. v. M/T Gilda*, 790 F.2d 1209, 1213 (5th Cir. 1986); *Blasser Bros., Inc. v. N. Pan-American Line*, 628 F.2d 376, 381 (5th Cir. 1980); *see also* 46 U.S.C. App. § 1303(4) (a bill of

lading is "prima facie evidence of the receipt by the carrier of the goods as therein described."). A COGSA shipper must also demonstrate damage upon discharge. *S.T.S. Int'l, Ltd. v. Laurel Sea Transp., Ltd.*, 932 F.2d 437, 440 (5th Cir. 1991). Damage upon discharge may be established by the report of an independent cargo surveyor attending the discharge. 46 U.S.C. App. § 1303(6); *United States v. Cent. Gulf Lines, Inc.*, 974 F.2d 621, 624-28 (5th Cir. 1992) (discussing the use of survey reports to establish loss or damage upon discharge); *see also* 22 C.F.R. § 211.9(c)(1) (requiring that a cargo surveyor attend the discharge of aid shipments made by the Agency for International Development or a cooperating sponsor).

A shipper's prima facie case creates a presumption of liability. *See Blasser*, 628 F.2d at 382. At that point, the burden of proof shifts to the defendant-carrier, which must prove (1) that it exercised due diligence to prevent the loss or damage to the cargo, 46 U.S.C. App. § 1304(1), or (2) that the loss or damage was the result of one of the Act's enumerated "uncontrollable causes of loss," *id.* at § 1304(2). *See also Tubacex*, 45 F.3d at 954; *Blasser Bros.*, 628 F.2d at 381.

If the carrier successfully rebuts the shipper's prima facie case, then the presumption of liability vanishes and the burden returns to the shipper to show that carrier negligence was at least a concurrent cause of the loss or damage to the cargo. *Tenneco Resins, Inc. v. Davy Int'l, AG*, 881 F.2d 211, 213 (5th Cir. 1989); *Blasser Bros.*, 628 F.2d at 382. If the shipper successfully establishes that the carrier's negligence is at least a concurrent cause of the loss or damage, then the burden shifts once again to the

carrier, which must establish what portion of the loss was caused by other factors. *Tenneco Resins*, 881 F.2d at 211; *Blasser Bros.*, 628 F.2d at 382. If the carrier is unable to prove the appropriate apportionment of fault, then it becomes fully liable for the full extent of the shipper's loss. *Tenneco Resins*, 881 F.2d at 211; *Blasser Bros.*, 628 F.2d at 382.

We review the district court's application of this burden shifting paradigm and other legal issues de novo. *See Mendes Jr. Int'l. Co. v. M/V Sokai Maru*, 43 F.3d 153, 155 (5th Cir. 1995). The district court's factual findings are reviewed for clear error. *Id.*

III.

On appeal, the United States claims that it established a prima facie case by producing clean bills of lading as proof that the carriers received the goods in an undamaged condition and survey reports showing that the goods were either missing upon discharge or were discharged in a damaged condition. Such a showing is clearly sufficient under COGSA. *See, e.g., Quaker Oats*, 734 F.2d at 240.

The defendants seek to avoid that conclusion in this case by arguing that the district court found the survey reports offered by the United States as evidence of loss or damage to be incredible. Thus, defendants maintain that the district court did not find credible evidence establishing the United States' prima facie case.

We disagree. The district court accepted the clean bills of lading as evidence that the cargo was delivered to

the defendants in good condition. The district court did not question the reliability of the survey reports as tendered to establish *loss or damage* to the cargo upon discharge. To the contrary, the district court accepted the virtually undisputed fact that the cargo was either lost or damaged upon discharge, and then held that the defendants were not responsible for the losses, either (1) because the damage occurring during discharge could have been caused by third parties, such as the port authority or its agents, *see U.N./F.A.O. World Food Programme v. M/V Tay*, 138 F.3d 197 (5th Cir. 1998) (interpreting the statutory exception codified at 46 U.S.C. App. § 1304(2)(q) to permit a carrier to avoid liability when it can prove that the loss or damage was caused after the carrier relinquished control of the cargo to a third party that, likewise, was acting completely beyond the carrier's control), or (2) because the United States failed to respond to the defendants' suggestion that improper packaging, an excepted cause under 46 U.S.C. App. § 1304(2)(n), played a role in the loss with evidence that the loss or damage was caused, at least in part, by negligence attributable to the carrier. Both of these holdings presume the existence of a prima facie case, and thus focus upon later stages of the COGSA burden shifting paradigm.

To the extent that the district court raised any question at all about the United States' reliance upon the survey reports, that question was limited to the issue of whether the survey reports were probative on the issue of *causation*, rather than *damage*. The district court referred to language appearing in two of the five survey reports, stating its opinion that the reports listed several possible

causes without settling upon a single cause as more probable than another. Thus, the district court suggested that those two reports standing alone did not tend to establish what caused that portion of the loss and damage (about 35 percent) documented in those surveys. The issue of causation, however, and the shipper's burden to prove concurrent causation in particular, is not a required element of the shipper's prima facie case and is, likewise, limited to the later stages of COGSA's burden shifting framework. For the foregoing reasons, we reject the defendants' argument that the district court implicitly rejected the United States' evidence of damage upon discharge and conclude that the United States satisfactorily established a prima facie case of loss or damage under COGSA by producing clean on board bills of lading for each shipment, paired with records unambiguously documenting that the cargo was either missing or damaged when discharged at the destination port.

IV.

The United States claims that the carriers failed to rebut its prima facie case. As set forth above, COGSA lets carriers rebut the shipper's prima facie case by showing that the facts and circumstances surrounding the loss fall within one of seventeen statutory exceptions denominated as "uncontrollable causes of loss" or, more directly, by demonstrating that the carrier exercised due diligence in its stowage, carriage, and discharge of the cargo. *See* 46 U.S.C. App. § 1304(2). There is considerable controversy, and even an intra-circuit conflict, as to whether the carrier's rebuttal burden with respect to most of those exceptions is one of production or persuasion.

The first sixteen of the seventeen statutory exceptions to carrier liability set out at 46 U.S.C. App. § 1304(2) merely provide that the carrier is not liable for losses or damages caused by one of the listed causes. In this group are included losses attributable to such things as an act of God, *id.* § 1304(2)(d), an act of war, *id.* § 1304(2)(e), and the primary exception at issue in this case, a shipper's own improper packaging, *id.* § 1304(2)(n). The seventeenth exception, § 1304(2)(q), is a catch-all exception, which states that the carrier is not liable for losses or damages resulting from "any other cause arising without the actual fault and privity of the carrier" or its agents. That subsection goes on, however, to provide that, with respect to § 1304(2)(q), "the burden of proof shall be on the person claiming the benefit of this exception" to show that the carrier's fault or neglect did not contribute to the loss or damage. *Id.* § 1304(2)(q). Thus, the exception codified at § 1304(2)(q) expressly requires that the carrier prove the applicability of the exception, while the remaining statutory exceptions are silent on the point.

Some Fifth Circuit panels have relied upon the additional statutory language in § 1304(2)(q) to implicitly place a heightened burden of proof on the carrier under § 1304(2)(q) and to permit a more lenient burden under the remaining exceptions. Specifically, some panels of this Court have required a carrier proceeding under § 1304(2)(q) to bear, not just the burden of going forward with evidence, but the burden of persuasion with respect to any defense premised upon that subsection. *See Tubacex*, 45 F.3d at 954-55 ("The burden on the carrier under" § 1304(2)(q) "is more than merely a burden of going forward with evidence, but rather it is a burden of

persuasion with the attendant risk of non-persuasion."); *Quaker Oats*, 734 F.2d at 241 ("The carrier's burden of establishing his own freedom from contributing fault" under § 1304(2)(q) "is no mere burden of going forward with evidence, but a real burden of persuasion, with the attendant risk of nonpersuasion.") (internal quotations omitted); *see also Westinghouse Elec. Corp. v. M/V Leslie Lykes*, 734 F.2d 199, 207 (5th Cir. 1984) (citing *In re Ta Chi Navigation (Panama) Corp.*, 677 F.2d 225, 229 (2d Cir. 1982), for the proposition that "[w]hen Congress wanted to put the burden of proving freedom from fault on a shipowner claiming the benefit of an exemption, it specifically said so"). Other courts have, in similar fashion, placed a mere burden of production on a carrier seeking to rebut the shipper's prima facie case when the catch-all provision in § 1304(2)(q) was not involved. *See, e.g., Sun Oil Co. v. M/T Carisle*, 771 F.2d 805, 811 (3d Cir. 1985) ("Thus, if the carrier wants to escape liability under COGSA without reference to a cause specified in section [130]4(2)(a)-(p), it must prove that its negligence did not contribute to the loss."); *EAC Timberlane v. Pisces, Ltd.*, 745 F.2d 715, 719-20 (1st Cir. 1984) (declaring that § 1304(2)(q) imposes upon the carrier the "most demanding burden under maritime law," that is, the burden of persuasion, whereas other COGSA exceptions carry "less imposing burdens"); *In re Ta Chi Navigation (Panama) Corp.*, 677 F.2d at 229 (opining that Congress intended for shipowners to bear a heightened burden of proof when relying upon § 1304(2)(q) and refusing to read that burden into § 1304(2)(b)); *Lekas & Drivas, Inc. v. Goulandris*, 306 F.2d 426, 432 (2d Cir. 1962) (refusing to "read the qualification of [§ 1304(2)](q) into

[§ 1304(2)](a)-(p)," because "Congress did not put it there"); *Hecht, Levis & Kahn, Inc. v. S.S. President Buchanan*, 236 F.2d 627, 631 (2d Cir. 1956) ("The language relating to burden of proof in 46 U.S.C. App. § 1304(2)(q) . . . pretty clearly refers only to the carrier's burden of proving that damage comes within subsection (q) and does not relate to the 'inherent vice' exception contained in § 1304(2)(m)."). Under these authorities, it would seem that once the shipper has proved his prima facie case, the carrier claiming an exception under § 1304(2)(a)-(p) bears merely a burden of production with respect to establishing the applicability of one of those exceptions. When, however, the carrier relies upon § 1304(2)(q), the carrier must bear the ultimate burden of persuasion with respect to the applicability of that exception.

The earliest Fifth Circuit decision to address the issue, however, at least implicitly reaches a different conclusion. In *Waterman S.S. Corp. v. United States Smelting, Refining & Mining Co.*, 155 F.2d 687, 691 (5th Cir. 1946), this Court held that a carrier seeking to avoid liability on the theory that the damages were caused by perils of the sea, § 1304(2)(c), or latent defects in the cargo, § 1304(2)(p), bore both the "burden of going forward" to demonstrate the applicability of the exceptions *and* "the risk of non-persuasion." *Id.* at 691. The proposition that a carrier bears both the burden of production and the burden of persuasion with respect to those exceptions was drawn from *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (1941). In *Commercial Molasses*, the Supreme Court held that "the shipowner, in order to bring himself within a permitted exception to the obligation to carry safely, whether imposed by statute or

because he is a common carrier or because he has assumed it by contract, must show that the loss was due to an excepted cause and not to breach of his duty to furnish a seaworthy vessel." *Id.* at 109. Furthermore, "since the burden is on the shipowner, [if] he does not sustain it, . . . the shipper must prevail if, upon the whole evidence, it remains doubtful whether the loss is within the exception." *Id.* The *Commercial Molasses* court explained that this burden rests upon the carrier "not in consequence of his being an ordinary 'bailee' but because he is a special type of bailee who has assumed the obligation of an insurer." *Id.* In addition to *Waterman*, which has never been overruled, there are decisions by this Court and others, which either suggest that the carrier bears the burden of persuasion for all § 1304(2) exceptions or fail to delineate any difference between the applicable burden for those exceptions codified at § 1304(2)(a)-(p) and the catch-all exception codified at § 1304(2)(q). *See Shell Oil Co. v. M/T GILDA*, 790 F.2d 1209, 1213 (5th Cir. 1986) ("Section [130]4(2)(q) provides that the carrier has the burden of proving it was not at fault if the cause of the loss is not listed in § [130]4(2)(a)-(p). 46 U.S.C. App. § 1304(2)(q). Congress therefore could not have intended the shipper to bear the burden of proving negligence in every case. Most courts and commentators have concluded from the structure of § [130]4(2) that Congress did not intend to place such a burden on the shipper in any case."); *see also Servicios-Expoarma, C.A. v. Industrial Mar. Carriers, Inc.*, 135 F.3d 984 (5th Cir. 1998) ("[T]he burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him."); *Tokio Marine*

& Fire Ins. Co. Ltd. v. Vessel Sammi Aurora, 903 F.2d 1244, 1246 (9th Cir. 1990) ("The carrier is not liable for damages arising without its actual fault, but the burden of proof to show that it was without its fault rests with the carrier."); *Sony Magnetic Prods., Inc. v. Marivienti O/Y*, 863 F.2d 1537, 1540 & n. 3 (11th Cir. 1989) (noting that, although the defendant produced evidence that the loss was caused by a latent defect, an excepted cause under § 1304(p), such evidence was "inconclusive," which required the conclusion that the defendant-carrier failed to sustain its burden of proving the applicability of the exception).[2] In sum, at this time there does not appear to be any consensus among the circuits, or even in this circuit, concerning which COGSA party bears the burden of persuasion (and the risk of nonpersuasion) with respect to the applicability of the statutory exceptions codified at § 1304(2)(a)-(p) once the shipper makes out a prima facie case.

The defendants raised two of the seventeen statutory exceptions in the district court. The defendants' main contention at trial was that a significant portion of the

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[2] We note that, to the extent that *Waterman* and similar Fifth Circuit cases constitute a direct holding on the issue of a defendant-carrier's rebuttal burden under COGSA, those cases are controlling under the "well-established prior panel precedent rule of this Circuit," which provides that "the holding of the first panel to address an issue is the law of this Circuit, thereby binding all subsequent panels unless and until the first panel's holding is overruled by the Court sitting en banc or by the Supreme Court." *Smith v. GTE*, 236 F.3d 1292, 1300 n. 8 (5th Cir. 2001).

damage was caused by the United States' failure to package the goods in a manner sufficient to survive the voyage. *See* 46 U.S.C. App. § 1304(2)(n) (exonerating carrier from liability for loss or damage caused by "insufficiency of packaging"). Exception (n) is one of those exceptions set out at § 1304(2)(a)-(p) as to which the precise scope of the rebuttal burden is unclear. While we have noted the apparent conflict or, alternatively, the incomplete resolution of this issue in our circuit precedent, we are not, in this case, compelled to decide whether the defendants' rebuttal burden with respect to their § 1304(2)(n) defense was one of production or persuasion. This is so because the defendants failed to produce competent evidence to meet either standard with respect to their § 1304(2)(n) defense.

Without regard to whether the carrier's rebuttal burden under § 1304(2)(n) is one of production or persuasion, the law is absolutely clear that the carrier must do more than offer mere speculation as to the cause of lost or damaged cargo. *Pacific Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229, 241 (5th Cir. 1985); *Harbert Int'l Establishment v. Power Shipping*, 635 F.2d 370, 375 (5th Cir. 1981) (noting that mere speculation is not an adequate rebuttal). Indeed, under "the policy of the law," the carrier must "explain what took place or suffer the consequences." *Compagnie De Navigation v. Mondial United Corp.*, 316 F.2d 163, 170 (5th Cir. 1963); *see also The Vallescura*, 293 U.S. 296, 303 (1934) ("[T]he law casts upon [the carrier] the burden of the loss which he cannot explain or, explaining, bring within the exceptional case in which he is relieved from liability."); *Pacific Employers Ins. Co.*, 767 F.2d at 242 (a shipper which has established a prima facie case is not

required to then prove how the damage or loss occurred; rather, it is for the carrier to come forward with evidence sufficient to exonerate itself). Even the lesser burden of production, if applicable to the defendants' § 1304(2)(n) defense, requires that a COGSA defendant provide more than mere "blanket assertions about mysterious possible causes" in order to rebut a COGSA plaintiff's prima facie case. *Transatlantic Marine Claims Agency, Inc. v. M/V OOCL INSPIRATION*, 137 F.3d 94, 101-02 (2d Cir. 1998); *see also Pacific Employers Ins. Co.*, 767 F.2d at 242 (when the "exact cause of the damaged cargo remains a mystery," the carrier will be liable, because "any doubts as to the cause of the loss must be resolved against the carrier").

To satisfy this burden, defendants relied solely upon survey reports prepared at discharge. While those reports documented the quantity and compromised quality of lost and damaged cargo with some precision, three of the five survey reports failed to provide even a speculative assessment with regard to the cause of the missing and damaged cargo. Thus, defendants failed to offer any probative evidence whatsoever with respect to their § 1304(2)(n) defense as it relates to those three shipments. The two remaining survey reports, both involving shipments to Tema, Ghana, included a list of five causes which may have contributed in some way to the loss, including the use of bags with very thin liners to package a portion of one shipment to Ghana and the entirety of a second shipment to Ghana. Together, the losses that can even potentially be associated with the surveyor's remarks about the packaging of these shipments is

slightly less than one-third of the total loss claimed by the United States.

With regard to the first shipment to Ghana, as to which the surveyor's remarks are limited to only one of the commodities included in the shipment, the survey does not in any way tend to establish that insufficient packaging, rather than one of the other listed causes, was the cause of the damage. Clearly, with regard to this shipment, the surveyor's speculation is insufficient to meet even a burden of production with respect to establishing their § 1304(2)(n) defense. *See Pacific Employers*, 767 F.2d at 241; *Harbert Int'l Establishment*, 635 F.2d at 375.

With regard to the second shipment, the survey report also includes the surveyor's remark that the portion of the overall damage attributable to "excessive spilling" during discharge "occurred due to poor packaging." This is clearly *some* evidence that poor packaging was at least a concurrent cause of *some* of the loss and damage arising from this second shipment. This evidence, however, is likewise insufficient to exonerate the defendants. As an initial matter, the surveyor's brief comment is not the only record evidence concerning the sufficiency of the packaging. The United States called Benjamin Myatt, a well-credentialed packaging expert employed by the Department of Agriculture, who is personally responsible for the development and specification of packaging systems used for foreign food assistance programs. Myatt testified that the cargos were packed in the standard packaging used for these commodities and that the United States had used the same type bags to ship 345,000 tons of food commodities the previous year.

Myatt testified that such packaging is subject to rigorous field and laboratory testing for burst strength and other qualities and that he had personally observed the discharge of famine relief cargo packaged in the very same bags without significant problems. In light of the record evidence as a whole, we conclude that the brief comments in the survey report for this second shipment to Tema, Ghana, are insufficient to satisfy the defendants' rebuttal burden, without regard to whether that burden was one of production or persuasion. Moreover, and even if the survey report, standing alone, was sufficient to satisfy a burden of production, we would still hold that the United States is entitled to recover. The defendants conceded that some of the damage was attributable to their own negligence, a concession which determined the damages awarded after bench trial. Even assuming the defendants satisfied their burden of rebutting the United States' prima facie case as to this single shipment, the record establishes that carrier negligence was at least a concurrent cause of the loss, and the defendants therefore bore the burden of establishing which portion of the loss was not attributable to carrier negligence. Defendants did not submit any evidence on the appropriate allocation of loss, and the United States is therefore entitled to recovery of the claimed damages for this shipment. *See Tenneco Resins*, 881 F.2d at 211; *Blasser Bros.*, 628 F.2d at 382.

The defendants also raised the applicability of the catch-all exception to liability codified in § 1304(q). Specifically, the defendants suggested that a portion of the loss and damage to the five shipments was attributable to pilferage, either from the vessel or from the docks and environs during discharge. The district court stated that a

COGSA carrier is not responsible for careless discharge. This is an incorrect statement of the law. COGSA extends through discharge, and a COGSA carrier is subject to statutory obligations to "properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried." 46 U.S.C. App. § 1303(2). This Court has recognized, however, that § 1304(2)(q) may shield a carrier from liability when the carrier has absolutely no control with respect to the selection of port stevedores or the rate they will be paid and, further, no control with respect to how or when the cargo is discharged. *See U.N./F.A.O. World Food Programme v. M/V Tay*, 138 F.3d 197, 200-02 (5th Cir. 1998). But this interpretation of § 1304(2)(q) is not broad enough to shield the carrier from liability for any and all stevedore negligence. To the contrary, such "lack of practical control is ordinarily associated with a breakdown of law and order so that the carrier is powerless to prevent the unlawful or negligent conduct of the stevedores." *Id.* at 201. As to this exception, the defendants clearly bore, not only the burden of production, but the burden of persuasion. *See* 46 U.S.C. App. § 1304(2)(q).

To satisfy this burden, the defendants submitted several exhibits tending to establish that pilferage occurred from the vessel or from the docks during discharge at the ports of destination or other ports. While these exhibits are probative on the issue of whether some pilferage occurred, they do not tend to establish that the defendants had no control over either the stevedores or the discharge process. To the contrary, several of the exhibits demonstrate that the ship agents were in some circumstances able to exert influence to have certain vessels

docked at berths considered more efficient or less prone to pilferage. The documents further reflect that defendants intended to rely upon contractual provisions to support a cause of action seeking recompense for any losses that the defendants were required to bear as the result of stevedore negligence. We further note that the defendants neither developed any arguments or testimony relating to these exhibits at trial nor raised the applicability of this exception on appeal. In light of the record as a whole, we conclude that the defendants did not satisfy their burden of persuasion with respect to their § 1304(2)(q) defense. Moreover, this defense suffers from the same weakness as the defendants' § 1304(2)(n) defense. That is, even if we were to assume that the defendants carried their rebuttal burden, the record establishes that carrier negligence was at least a concurrent cause of the damages claimed, and the defendants failed to make any attempt to apportion or separate the losses attributable to their own negligence as compared to the losses attributable to pilferage or some other cause. *See Tenneco Resins*, 881 F.2d at 211; *Blasser Bros.*, 628 F.2d at 382.

For the foregoing reasons, we conclude that the defendants failed to rebut the United States' prima facie case. Further, even if the defendants had carried such burden, the United States established that at least some of the loss and damage was attributable to the defendants' negligence, and the defendants failed to respond with evidence tending to establish precisely what portion of the claimed loss and damage was attributable to another concurrent cause.

V.

The United States asks us to render judgment in its favor. The United States contends that the extent of liability is established by declarations in the bills of lading covering the shipments. COGSA expressly allows a shipper to declare the value of its cargo as long as "the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." 46 U.S.C. App. § 1304(5). "This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier." *Id.*

The district court found that the declarations of the cargo's value embodied in the bills of lading were sufficient evidence of damages claimed in this case. We agree. *Id.* The carriers' only rebuttal to this proof of value is that the bills of lading were inadmissible "double hearsay." The carriers state that "[t]he information for the value as listed on the bills of lading is not based on personal knowledge of the agents of defendants who issued the bills of lading." Regardless of whether this is true, it is irrelevant. The statute allows the *shipper* to declare the cargo's value, and inclusion of this value on the bill of lading evidences the carrier's acquiescence to this declaration. The United States' declared value was prima facie evidence of the cargo's value and, absent any rebuttal evidence from the carrier, is adequate to set the value of the cargo for damage calculation purposes.

Moreover, we are comforted in this case by testimonial evidence from the government employee responsible for setting the value of the cargo, who testified that the very precise bill of lading values declared were

drawn from invoices reflecting the government's actual purchase price for the commodity. We are not, therefore, dealing with a potential differential between the value declared for shipping purposes and the value as measured by the price paid for the commodity. In addition, the record contains the government's claim forms for the various cargos. The damages detailed therein are based upon a unit price for the commodities plus freight costs. Testimonial evidence established that these documents would likewise have been checked against and premised upon the government's actual purchase price for the goods. Thus, the damages claimed are not premised upon a unitary value taken directly from the bill of lading, but are instead calculated using the actual costs to the government. We agree with and, therefore, affirm the district court's factual determination that the United States produced competent evidence of the damages claimed. We, therefore, see no barrier to a decision rendering judgment in favor of the United States.

VI.

The United States requests that this Court award prejudgment interest running from the date of last discharge through the time of judgment, calculated in accordance with 31 U.S.C. § 3717. The United States preserved error on this issue in the district court. In this Circuit, there is a strong presumption in favor of awarding prejudgment interest. *See Ryan Walsh Stevedoring Co., Inc. v. James Marine Serv., Inc.*, 792 F.2d 489, 492 (5th Cir. 1986). The defendants respond that the United States exercised undue delay in bringing these actions and, therefore, that it should be denied prejudgment interest. The United

States filed the five actions consolidated here in December 1998, less than three years after the last date of discharge and well within the six year statute of limitations set by Congress for claims filed by the CCC. 15 U.S.C. § 714b(c) (1994). This suit was timely filed. Finding no other reason to deny prejudgment interest, we therefore render judgment for the United States in this case in the amount of $203,319.87, plus pre-judgment interest calculated in accordance with 31 U.S.C. § 3717.

CONCLUSION

For the reasons stated above, the judgment of the district court is **VACATED** and judgment is **RENDERED** in favor of the United States in the amount of $203,319.87 plus pre-judgment interest.

APPENDIX B

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA, Plaintiff,	§	
versus	§	CIVIL ACTION H-98-4173
OCEAN BULK SHIPS, INC., *et al.*, Defendants.	§	

Findings of Fact and Conclusions of Law

1. *Introduction.*

A shipper sued two carriers for damages for short delivery. The shipper will recover $7,300.08 for wetting damage that the carrier admits occurred before discharge.

2. *Background.*

Between April of 1994 and January of 1996, Ocean Bulk Ships, Inc., and Transbulk Carriers, delivered cargo – carried on the *Overseas Harriette* and the *Overseas Marilyn* – to African ports. Relief agencies arranged for the carriers to deliver food aid (sorghum, vegetable oil, yellow corn, bulgur wheat, corn-soy blend, and wheat-soy blend), but the consignee did not receive all of it. The government, as assignee of the relief agencies' cargo claims, says that Ocean Bulk and Transbulk delivered too little, spilled it, and wet it. The carriers say that they are not responsible for these deficiencies because the cargo

was in good condition when the stevedore opened the holds.

3. *Law.*

To or from ports of the United States federal law applies to every contract for carriage of goods by sea. *See* Carriage of Goods by Sea Act, 46 U.S.C. App. §§ 1300-1315. Although the carrier is not an insurer, it must use reasonable care to furnish a seaworthy vessel and to deliver the cargo. A carrier is not responsible for damages from deficient packaging or careless discharge.

4. *Bills of Lading.*

The government offered the bills of lading to prove its damages. Bills of lading are evidence of the cargo's value, but they are not conclusive. Normally, the carrier's liability is limited to $500 per package. The shipper may declare a higher value and pay an adjusted freight rate. This limit applies only if the shipper has notice of its opportunity to declare higher value of the cargo. Here, the shipper declared a higher value on the bills of lading; however, the declarations do not bind the carrier.

The government furnished no other readily available evidence in its possession to establish the cargo's value like invoices, commodities prices, or its internal CCC-512 forms. Declaration of value is a unilateral assertion for insurance purposes, but here, it is the *only* evidence of the cargo's worth. While it is weak, it is sufficient.

5. *Surveys.*

The government also relies on the surveys made at the African ports. The reports specify the cargo's condition on delivery. They also detail reasons for non-delivery, including water damage, theft, and spillage (bags damaged on board and during discharge); however, the surveyor did not quantify the cargo not delivered by category. The report's reasons for non-delivery are generic – they cover the litany of possibilities for damage to cargo. Further, the shipper must address the known thefts at port with it and its agents, not the carrier. No shortage existed when the holds were opened.

The government relies heavily on the surveys to support its claims of short delivery; however, it ignores the portions of the reports about poor-quality packaging: "[T]he cause of the damage loss could be attributed to . . . the use of light textured paper with very thin inter lining for stuffing the cargo." Government exh. 23. At trial, the government tried to rebut the African surveyors's conclusions by calling a packaging specialist. He testified that the three-ply paper bags were sufficient merely because the government requires grain commodities to be shipped in them. He admitted that, not having witnessed the unloading, he could not identify the reason the bags failed.

The contents of the surveys are insufficient to establish the carrier's liability for the non-delivered and damaged cargo.

6. *Conclusion.*

The shipper will take $7,300.08 from the carrier.

Signed December 17, 1999, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA, Plaintiff,	§	
versus	§	CIVIL ACTION H-98-4173
OCEAN BULK SHIPS, INC., *et al.*, Defendants.	§	

Final Judgment

The shipper takes $7,300.08 from the carrier.

Signed December 17, 1999, at Houston, Texas.

/s/ Lynn N. Hughes
Lynn N. Hughes
United States District Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20117

UNITED STATES OF AMERICA

Plaintiff – Appellant-Cross-Appellee

v.

OCEAN BULK SHIPS INC; TRANSBULK CARRIERS

Defendants – Appellees-Cross-Appellants

M/V OVERSEAS HARRIETTE, its engines, tackle, etc., in rem; M/V OVERSEAS MARILYN

Defendants – Appellees

UNITED STATES OF AMERICA

Plaintiff – Appellant-Cross-Appellee

v.

OCEAN BULK SHIPS INC, in personam

Defendant – Appellee-Cross-Appellant

M/V OVERSEAS HARRIETTE, its engines, tackle, etc in rem

Defendant – Appellee

UNITED STATES OF AMERICA

Plaintiff – Appellant-Cross-Appellee

v.

OCEAN BULK SHIPS INC, in personam

– Defendant – Appellee-Cross-Appellant

M/V OVERSEAS MARILYN, its engines tackle etc in rem

Defendant – Appellee

UNITED STATES OF AMERICA

Plaintiff – Appellant-Cross-Appellee

v.

OCEAN BULK SHIPS INC, In personam

Defendant – Appellee-Cross-Appellant

Appeals from the United States District Court
for the Southern District of Texas, Houston

ON PETITION FOR REHEARING EN BANC

(Filed Jun. 8, 2001)

(Opinion 04/10/01, 5 Cir., ___, ___ F.3d ___)

Before KENNEDY*, JONES and DEMOSS, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel

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*Circuit Judge of the Sixth Circuit, sitting by designation.

Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge